Supreme Court, U.S.
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No. 94-1600

In The

Supreme Court of the United States

October Term, 1994

BARRY P. DAVIS,

Petitioner,

v.

TEXACO REFINING AND MARKETING INC.,
a Delaware Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Court

BRIEF IN OPPOSITION

ROBERT E. FULLER
Counsel of Record

Attorney-at-Law
10 Universal City Plaza
Universal City, CA 91608
(818) 505-3916

THOMAS W. SONDAG
JAMES L. ROBART
LANE POWELL SPEARS LUBERSKY
520 S.W. Yamhill St.
Suite 800
Portland, OR 97204-1383
(503) 226-6151

April 27, 1995

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Ninth Circuit correctly found that a gasoline service station franchisee's intentional failure to obey a federal court order was a sufficient ground for termination of his franchise under the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq.*, and whether such a failure allowed the franchisor to effectuate the termination upon a shortened notice period?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Barry P. Davis, and the Respondent, Texaco Refining and Marketing Inc. The same parties are before this Court.

In addition, Texaco Refining and Marketing Inc. hereby lists publicly traded affiliated corporate entities pursuant to Rule 29.1 as follows:

Texaco Inc.
Texaco Canada Petroleum Inc.
Texaco Nigeria PLC

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BRIEF IN OPPOSITION

The Respondent, Texaco Refining and Marketing Inc., respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is not reported, but it is reprinted in the appendix hereto at A-1.

STATEMENT OF THE CASE

In the unanimous opinion below per Judges Fletcher, D. W. Nelson, and Rymer, the Ninth Circuit assessed the propriety of a district court's grant of summary judgment

to Respondent Texaco Refining and Marketing Inc. ("Texaco") on claims by its former franchisee, Petitioner Barry P. Davis ("Davis"), that his three gasoline service station franchises were improperly terminated under the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq.* ("PMPA"). The franchises were terminated by Texaco on ten days' written notice after Davis willfully violated a federal court order enjoining Davis from not honoring the requirement that he keep the stations open 24 hours a day, seven days a week. Davis claimed that the grounds for termination cited by Texaco were insufficient under the PMPA, and that he received improperly shortened notice of the terminations.

The district court found that, as a matter of law, the grounds for termination were sufficient under the PMPA, and that the shortened notice period was appropriate under the circumstances. The Ninth Circuit agreed and affirmed.

Davis also challenged district court rulings on other issues. One such challenge was to the dismissal of Davis's three counterclaims to Texaco's specific performance action (which was brought to require Davis to comply with the terms of his franchises). Two of these counterclaims were based upon Oregon statutes governing reasonableness and good faith in franchise relationships, O.R.S. §650.210, and O.R.S. §650.245. They were dismissed as moot by the district court because they were pressed after Davis had been terminated. The Ninth Circuit affirmed this determination, and also found that the state law claims were pre-empted by the PMPA.

Davis's third counterclaim to the Texaco specific performance suit was based upon 42 U.S.C. § 1983, alleging that Texaco's seeking of court orders to "require" him to work on his Sabbath deprived him of his civil rights and violated his constitutionally protected religious free exercise freedoms. The district court held that Davis failed to meet the threshold requirement of a § 1983 claim because he could not show that Texaco's resort to the *federal* court rendered it a state actor, or a private actor acting under "color of state law." *Wheeldin v. Wheeler*, 373 U.S. 647, 650 & n.2 (1963). The Ninth Circuit affirmed. (The Ninth Circuit also affirmed other rulings of the district court challenged by Davis below of no moment here.)

The facts underlying the claims at issue here are unusual. Prior to October, 1992, when this dispute arose, Mr. Davis was for more than a decade a highly successful gasoline service station operator; one of Texaco's best. By the summer of 1992, Mr. Davis was the operator and lessee of three Texaco service stations in the State of Oregon. Each station was the subject of franchise contracts and leases, governed by the PMPA. In October, 1992, Mr. Davis wrote to Texaco, requesting:

> "that the leases in my three Texaco stations be amended to reflect a change from 24 hours, 365 days a year to 24 hours a day except for the Lord's Sabbath, (from sundown on Friday to sundown on Saturday) commencing on January 1, 1993."

The request went to the heart of the franchise relationship – how long each service station location would be open to serve customers.

Texaco respectfully denied Davis's request. Texaco tried over many weeks to handle the issue through negotiation; it tried to reach some accommodation whereby the locations would be run by others, thus having the stations open to serve customers and leaving Davis free to honor his personal religious beliefs. (The stations were over a hundred miles apart, so Davis's presence was not physically possible at each location all the time anyway.) Nevertheless the matter proved insoluble; Davis would agree to nothing short of closure of all three locations while he was personally observing his Sabbath. So despite efforts to reach an accommodation, Davis commenced closing all three stations in January, 1993 from Friday night through to Saturday night.

The closures did grievous harm to Texaco's goodwill, trade name, and gasoline sales. Several hundred motorists stopped in the locations every day during Davis's unilateral closures, only to come away disappointed. The injury done to Texaco's tradename and good reputation by these closures was enormous, as customer goodwill towards Texaco (including their current and future business) was diminished markedly upon the failure to meet the usual consumer expectations of stations being open. By April of 1993, the situation became untenable, but Texaco nevertheless refrained from removing Davis as a franchisee. Instead, Texaco filed a specific performance action seeking declaratory and injunctive relief aimed at keeping the stations open 24 hours a day, seven days a week pursuant to the understandings and agreements between Texaco and Davis.

On April 26, 1993, the district court granted Texaco's motion for an order temporarily restraining Davis "from

breaching the parties' sales agreement[s] requiring 24-hour operation." Following his own public announcement of his intended disobedience of the federal court order, Davis violated the order by shutting down Texaco's stations. On May 7, 1993, the district court entered a preliminary injunction to the same effect. Davis continued baldly to defy the federal court, and violated the injunction each of the following two weekends.

In the face of Davis's persistence in ignoring the federal court orders, Texaco gave up its efforts to obtain Davis's performance of his contractual obligations, and on May 18, 1993, it notified him that the franchises would be terminated in ten days. Among the grounds for termination, Texaco cited Davis's failure to abide by the court orders, obeyance of the law being a material term of the franchise agreements. Davis continued to shut the stations down, and his franchises were terminated on May 28, 1993.

Texaco filed a second action on May 19, 1993, (the day after the termination notices were sent) seeking a declaration that its termination of the franchises was proper under the PMPA. On October 20, 1993, the district court granted summary judgment to Texaco on the PMPA claim, affirming Texaco's right to terminate the franchises because of Davis's failure to obey the law, and to do so on ten days' notice. The district court also dismissed Davis's counterclaims against Texaco as either moot, or not well stated. Davis's appeals from the district court's orders were consolidated before the United States Court of

Appeals for the Ninth Circuit, which affirmed the district court in all respects on December 29, 1994.

REASONS WHY THE PETITION SHOULD BE DENIED

This case is a pedestrian commercial matter arising under the Petroleum Marketing Practices Act. The opinion below stands for the straightforward proposition that a franchisee's duty to obey federal court orders directly impacting the franchise is a material term of the franchise relationship, the breach of which creates in the franchisor the grounds to terminate the franchise on less than the Act's usual ninety days' notice.

There is no constitutional or other substantial federal question raised in either the opinion below, or in the facts underpinning this case. There are no conflicts among the circuits regarding the holding of the opinion below, or in any decisions cited by the Petitioner. The correctly decided opinion below is controlled by Supreme Court precedent on the purported religious free exercise issue, and by the PMPA and unremarkable Ninth Circuit decisions thereunder on the commercial issues.

The Ninth Circuit's opinion below reveals a case entirely different from that which Davis presents the Court. Davis's two "reasons for granting the writ" misstate the facts, and simply to state his subsidiary points is enough to establish that this case does not deserve review. In order, Davis contends that the reasonableness and materiality of franchise terms can never be assessed as a matter of law (Pet 6); that the facts of this case did

not bring it within the exception to the PMPA rule requiring 90-day notice of the franchise termination (Pet 8); that the facts did not support an injunction enforcing the franchise agreements (Pet 11); and that a private actor's "cooperative" activities with state officials can give rise to a § 1983 claim for conduct wholly unrelated to the "cooperative" activities (Pet 14). The first point is certainly wrong; the second and third are fact-bound inquiries of no significance; and the fourth is an oddly cast argument that has never been raised in any court before now.

Moreover, in stating his Questions Presented, Davis has contradicted his prior admission, and challenged evidentiary rulings. In short, there is nothing at all here deserving of this Court's attention.

1. This is a case which relies heavily on its own particular facts, it is unlikely to affect anyone beyond the parties, and the Petitioner's questions presented are not fairly raised by the facts.

A. The decisions in this case were driven by the course of events, the Petitioner's conduct, and certain key facts.

At each step of this case, the district court's decision-making was driven by the unusual posture of the litigation, the unusual and defiant conduct of the Petitioner, and, ultimately, the key facts impacting its assessment of the legality of Texaco's termination of the franchises on shortened notice.

At the outset of the case Texaco sought a declaratory judgment that the hours of operation applicable to the

franchises were twenty-four hours a day, seven days a week, and injunctive relief obliging Davis to honor those terms. Davis complains that whether the parties' agreements required 24-hour operation "was a matter for the factfinder to decide" (Pet 14), but, of course, fact finding for purposes of assessing the injunctive relief was precisely the role the district court rightfully played in granting Texaco a preliminary injunction. The district court necessarily had to take the contract documents, course of dealings between the parties, amending documents, and admissions by the parties into consideration before making its determination to grant the injunction request. Moreover, the positions of the parties – the harm being suffered by Texaco in the damage to its trade name and reputation versus the purported imposition on an individual's religious practices – were weighed by the district court. As is normal for injunction proceedings, the district court's decisions here were highly fact-driven.

Following Petitioner's open defiance of the court order, Texaco sought not only to terminate the franchises for Davis's failing to obey the law, but to do so on less than the generally-required ninety days' notice. The district court was again faced with a heavily fact-based determination of whether the injury being suffered by Texaco as the result of Davis's conduct was of a sufficient magnitude to allow for the termination on the shortened notice. The district court considered Texaco's prolonged efforts to negotiate a resolution of the issue short of litigation, the policies and practices of Texaco when confronted with a service station dealer who breaks the law, and the claims of the parties in the case.

Another unique fact on which this case turns is the timing of the litigation events. Davis's refusal to obey the law led to the termination of the franchises, which mooted the very issues he sought to raise as defenses to the enforcement of the franchise terms. It also mooted the claims for damages arising from that enforcement. Davis mistakenly asserts that his damage claims were based on the termination of the franchises. (Pet 11) If he had had such claims, they would not have been dismissed as moot, but rather dismissed as the result of the determination that the franchise terminations were lawful. As the Ninth Circuit explained, "Davis has no claim to damages from being forced to work on the Sabbath in violation of his religious beliefs because Davis never complied with Texaco's demand that he do so." (A-8) (In effect, the Ninth Circuit even overstates Davis's case because Texaco merely requested that the locations be kept open on his Sabbath, not that Davis personally work on the Sabbath.)

This is the rational, logical, and to Davis, fatal course of the events of the litigation. He cannot claim that the chain of events was forced upon him; his voluntary conduct led to the termination of the franchises before he gained determinations on the issues he sought to raise. He failed in his efforts to obtain a stay of the district court's preliminary injunction while he appealed from it; yet, he did not comply with it. Similarly, after the district court denied his motion to enjoin the termination of the franchises, he did not seek a stay pending his appeal from that order. Consequently, the franchises were terminated, and the only issue remaining for the district court's disposition was whether those terminations were proper under the detailed requirements of the PMPA.

It is readily apparent that this peculiar set of facts is not indicative of some wide-spread conduct within American commerce that requires the attention of this Court. These issues are not meaningful, substantial, or important to commerce. Accordingly, any decision by this Court on the issues raised in this case will likely affect only the two parties, Texaco and Davis.

B. The questions presented by Petitioner are not fairly presented by the facts, nor are they of the type which are appropriate for this Court's review.

The purported constitutional religious free exercise issues Davis posits in his petition are not fairly raised by this case. Texaco did not terminate Davis for any reason of his religion; the termination and the case turn on the key fact of Davis's refusal to obey the law. The district court expressly found that Texaco took "no action for the purpose of restricting defendant's religious beliefs." (Pet at A-8) The Ninth Circuit pointed out that "Davis has failed to produce any evidence suggesting a retaliatory motive." (A-7)

To state his first question presented Petitioner has had to resort to impeaching his own admission. He claims in the petition that the contract documents establish a requirement for operation that was not twenty four hours a day, seven days a week. This belies the admission made by Davis in an October 12, 1992, letter he wrote Texaco expressly acknowledging the "24 hours, 365 days a year" requirement, and it goes against both the course of dealings between the parties and the understanding Davis

had of the franchise requirements. This evidentiary legerdemain is a disingenuous reflection of the state of the record below, and it is also the very type of evidentiary issue which is wholly inappropriate for consideration by this Court.

Finally, the second question presented is nothing more than a plea for this Court to take issue with the evidentiary rulings and evidentiary weighing undertaken by the district court.

2. The alleged constitutional issue is controlled by existing Supreme Court precedent.

The purported religious free exercise issues, even if fairly raised (which they are not) are controlled by *Wheeldin v. Wheeler*, 373 U.S. 647, 650 & n.2 (1963). The simple answer to the purported religious free exercise issue asserted by Petitioner is that Texaco was not a state actor. The state actor requirement is placed upon a § 1983 claim precisely because such a claim arises under the fourteenth amendment. The acts of the federal court are insufficient action to paint the person who resorts to the federal court with state actor status; Texaco's attempt to enforce the franchise was pursued in federal court, so the state action requirement is simply not met here.

Davis's argument that the state action requirement is satisfied by Texaco's and Oregon's "cooperation" in "providing services to the public" (Pet 14-16) is not only unsupported by any law, but, more important at this

stage, it is an argument that has never been made before, either in the district court or the court of appeals.

3. The Ninth Circuit correctly decided the matter.

There is no substantial question raised by the opinion below; the Ninth Circuit correctly decided the commercial issue under the Petroleum Marketing Practices Act, and it followed the well-settled interpretations and decisions under that Act. It found, unsurprisingly, that the failure to follow a federal court order directly impacting the operation of the franchises was a breach of a material term of the franchise relationship, entitling the franchisor to initiate termination of the franchises. It also followed express PMPA provisions and case law in approving of the shortened notice period.

The purported state law and constitutional issues were also correctly affirmed as either moot, pre-empted, or, as discussed above, not well stated under existing Ninth Circuit and Supreme Court precedent.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT E. FULLER
Counsel of Record

Attorney-at-Law
10 Universal City Plaza
Universal City, CA 91608
(818) 505-3916

Of Counsel

THOMAS W. SONDAG
JAMES L. ROBART

April 27, 1995

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TEXACO REFINING AND MARKETING, INC.,
a Delaware corporation

Plaintiff-Appellee,

v.

BARRY P. DAVIS,

Defendant-Appellant.

No. 93-35466,
93-35589,
93-36101
D.C. No. CV-93-595-FR
CV-93-481-FR

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*MEMORANDUM

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding
Argued and Submitted November 1, 1994
Portland, Oregon

Filed December 29, 1994

Before: FLETCHER, D.W.NELSON, and RYMER, Circuit Judges

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* This disposition is not appropriate for publication and may be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Barry Davis, a former franchisee of three gasoline stations franchised to him by Texaco Refining and Marketing, Inc. ("Texaco"), appeals the district court's grant of Texaco's motion for summary judgment in its action to terminate its franchise relationship with Davis. We have jurisdiction and affirm. We dismiss Davis's other appeals as moot.

I

Prior to May, 1993, Davis was the franchisee of three Texaco service stations in Salem, Eugene, and Clackamas, Oregon. Each of the stations operated under a separate franchise agreement between Texaco and Davis. Although the franchise agreement for the Eugene station expressly required operation of the station twenty-four hours a day, seven days a week, the Clackamas and Salem agreements did not. Nevertheless, Davis had been operating all of the stations on a twenty-four hours a day, seven days a week basis for several years prior to the events leading to this appeal.

In October, 1992, Davis wrote a letter to Texaco representatives requesting that he be permitted as of January 1, 1993 to close his stations for the Sabbath, from sundown on Friday to sundown on Saturday, due to changes in his religious beliefs. Texaco took the position that Davis was required to operate all of his stations on a twenty-four hours a day, seven days a week basis and denied Davis's request. Although Davis and representatives from Texaco met several times throughout the remainder of 1992, their attempts to reach agreement were unsuccessful.

Commencing January 1, Davis closed his stations each Sabbath. After sending Davis at least four written warnings that the closures violated his agreements with Texaco and placed his franchises at risk of termination, Texaco brought suit in district court for specific performance of the parties' franchise agreements, which it claimed required twenty-four hours a day, seven days a week operation of all three stations. The district court issued a preliminary injunction requiring Davis to keep his stations open twenty-four hours a day, seven days a week. Davis sought a stay of the preliminary injunction, but the district court denied his motion.

After Davis disobeyed the preliminary injunction by closing his gas stations on Friday night and Saturday on the following two weekends, Texaco notified Davis on May 18, 1993 that his franchises would be terminated ten days later due to his violations of the franchise agreements and the preliminary injunction. On May 19, Texaco commenced an action for declaratory judgment that its termination of the franchises was proper and for an injunction requiring Davis to surrender his stations to Texaco. The district court rejected Davis's motion for an order temporarily restraining the termination and granted Texaco's motion for summary judgment. The court held that Davis's noncompliance with the preliminary injunction justified Texaco's termination of the franchises as a matter of law because it constituted a violation of a provision in his franchise agreements that he obey all applicable judicial orders. During the same proceeding, the district court dismissed Davis's counterclaims to Texaco's prior suit for specific enforcement. The court

dismissed two of the counterclaims as moot and dismissed the third counterclaim for failure to state a claim.

The various decisions made by the district court have resulted in the three appeals consolidated before us. In the "core" appeal, Davis argues that termination of his franchises violated the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801-2841, and that the district court erred by dismissing his counterclaims to Texaco's prior suit for specific enforcement. In separate appeals, Davis also appeals the district court's denial of his motion for an order temporarily restraining the terminations and the district court's grant of the preliminary injunction requiring him to operate his stations on a twenty-four hours a day, seven days a week basis.

II

The PMPA prohibits the termination of a franchise unless the franchisor complies with the Act's notice requirements and terminates for reasons enumerated by the Act. Davis maintains that Texaco's termination was without sufficient notice and without adequate grounds.

A

Although section 2804(a)(2) of the PMPA requires a franchisor generally to give a franchisee ninety days notice of termination, Texaco provided Davis only ten days notice. However, we conclude that the district court did not err in finding that requiring ninety days notice in this case would not have been reasonable and, therefore, under an exception to section 2804(a)(2), Texaco was

required only to give notice when "reasonably practicable." 15 U.S.C. § 2804(b)(1); *see also Abujudeh v. Mobil Oil Corp.*, 841 F.2d 310, 311-12 (9th Cir. 1988) (interpreting § 2804(b)(1)).

Texaco submitted evidence establishing that Davis's non-compliance with the preliminary injunction during the ninety day notice period would have subjected Texaco to mounting lost profits and loss of goodwill. *See Marathon Petroleum Co. v. Pendleton*, 889 F.2d 1509, 1512 (6th Cir. 1989) (less than ninety days notice reasonable when franchisee had declining interest in operating station and was failing to maintain adequate gasoline supplies). Although Texaco had several months notice that Davis intended to close his stations for twenty-four hours on the weekends, what the district court called the "pivotal issue giving rise to the termination" did not occur until Texaco had obtained the preliminary injunction and Davis refused to comply with it. Requiring Texaco to seek termination as soon as its relationship with Davis became problematic would undermine the purpose of the PMPA to protect station operators from arbitrary termination. *See DuFresne's Auto Service, Inc. v. Shell Oil Co.*, 992 F.2d 920, 925 (9th Cir. 1993) (discussing congressional intent behind PMPA); *see also Nassau Blvd. Shell Service Station, Inc. v. Shell Oil Co.*, 875 F.2d 359, 362-63 (2d Cir. 1989) (requiring franchisor to initiate termination "as soon as [it] hears an allegation against a franchisee [would be] at odds with the congressional intent in promulgating the PMPA"); *Desfosses v. Wallace Energy, Inc.*, 836 F.2d 22, 29 (1st Cir. 1987) (franchisor "entitled to a reasonable time to

evaluate the need for termination"). Under the circumstances, Texaco provided notice as soon as reasonably practicable.

B

As the franchisor, Texaco bears the burden of proving that grounds existed for terminating its relationship with Davis. 15 U.S.C. § 2805(c). We hold that Texaco has met its burden as a matter of law. Under section 2802(b)(2)(A) of the PMPA, a franchisor may terminate if the franchisee fails to "comply with any provision of the franchise" that "is both reasonable and of material significance to the franchise relationship."[1] Texaco terminated its relationship with Davis because he violated a provision in his sales and lease agreements with Texaco requiring in part that he obey "any applicable . . . judicial . . . orders." Davis admits that he did not comply with the district court's order that he keep his stations open twenty-four hours a day.

Davis contends, though, that the preliminary injunction "was improvidently issued" and cannot be material to the franchise relationship. He argues that the district

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[1] The district court also found grounds for termination under section 2802(b)(2)(B), which provides for termination if the franchisee fails to "exert good faith efforts to carry out the provisions of the franchise," and under section 2802(b)(2)(C), which provides for termination upon the "occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise. . . . is reasonable." Because we find that termination was appropriate under section 2802(b)(2)(A) we do not address whether termination would be justified under these other provisions.

court should not have issued the preliminary injunction because Texaco had failed to show a likelihood of success on the merits in its suit for specific performance and because the balance of harms favored Davis. Even if the preliminary injunction otherwise was properly issued, he argues, it violated the First Amendment by requiring him to violate his religious beliefs.

We decline Davis's invitation to review the propriety of the preliminary injunction. Termination was based on Davis's violation of a contract provision that has nothing to do with religion; it simply requires him to comply with judicial orders. Davis's conduct in the face of a binding judicial order impaired Texaco's expectation that he would comply with the law and discharge his obligations to the franchise. *See Khorenian v. Union Oil Co.*, 761 F.2d 533, 536 (9th Cir. 1985) (franchisors are "entitled to reasonable expectations of compliance by the franchisee with the provisions of the franchise agreement"). Moreover this particular injunction pertained to Davis's work hours, a provision included in the parties' agreements. Under these circumstances, the requirement that Davis comply with judicial orders was reasonable and material to the franchise relationship, and Davis's breach of this contract provision constituted grounds for termination under the PMPA, regardless of the validity of the district court's order.[2] *Cf. Lewis v. Exxon Corp.*, 716 F.2d 1398, 1399-1400 (D.C. Cir. 1983) (basis of termination under

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[2] For identical reasons, the district court properly ignored defendant's affirmative defenses, which were based on the alleged unconstitutionality of the preliminary injunction.

section 2802(c)(12) of the PMPA is fact of felony conviction, not the conviction's validity).

Davis maintains that, even if valid grounds for termination existed, termination nevertheless was inappropriate because Texaco invoked these grounds as a pretext to retaliate against him for "vigorously and publicly defending his constitutional rights." Although a franchisee may rebut a franchisor's grounds for termination by producing evidence that the termination was based on illegitimate considerations, *see Reyes v. Atlantic Richfield Co.*, 12 F.3d 1464, 1469-70 (9th Cir. 1993), Davis has failed to produce any evidence suggesting a retaliatory motive. The fact that Texaco did not resort to the courts until four months after Davis began closing his stations on Saturday does not, as Davis maintains, "belie a hidden agenda." This allegation alone does not raise a genuine issue of material fact regarding a retaliatory motive.

III

Davis appeals the district court's order of summary judgment in favor of Texaco in his counterclaims to Texaco's action for specific enforcement. In response to Texaco's action for specific performance, Davis brought three counterclaims against Texaco. In two of these, Davis argued that Texaco's attempt to keep his service stations open twenty-four hours a day, seven days a week as a bad faith attempt to impose an unreasonable standard of conduct and therefore violated Oregon's statutory law

governing motor fuel franchises. *See* O.R.S. §§ 650.210(5) and 650.245.[3]

Davis also pursued a counterclaim against Texaco under 42 U.S.C. § 1983, arguing that Texaco had acted under color of state law to deprive him of a federally protected right by resorting to the courts to require him to work on the Sabbath in violation of his religious beliefs.

We hold that Davis's counterclaims were properly dismissed.

A

We agree with the district court that Davis's state law counterclaims are moot because relief is no longer available. Because Davis does not still operate the service stations, he cannot obtain injunctive relief from a twenty-four hours a day, seven days a week schedule of operation. Furthermore, Davis has no claim to damages from being forced to work on the Sabbath in violation of his religious beliefs because Davis never complied with Texaco's demand that he do so.

Davis contends that he retains viable claim for damages resulting from the loss of his service stations in the termination action because if Texaco had not sought to obtain a preliminary injunction requiring him to keep his

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[3] O.R.S. § 650.210 prohibits a franchisor from imposing a contract, rule, or regulation upon a franchisee unless it can sustain the burden of proving the standard of conduct to be reasonable. O.R.S. § 650.245 requires that the principle of good faith must govern the franchise relationship.

stations open on the Sabbath, the district court would not have granted the preliminary injunction, he would not have disobeyed it, and his franchise relationship would not have been terminated. We reject his "but for" analysis. Although Texaco's request for a preliminary injunction may have set in motion the chain of events eventually leading to Davis's termination, the reason for termination was Davis's violation of a provision of his franchise agreements requiring him to comply with judicial orders. We fail to see how Davis can recover damages under state law for a termination that was lawful under the PMPA. *See* 15 U.S.C. § 2806(a) (PMPA preempts state law "with respect to termination"); *Simmons v. Mobil Oil Corp.*, 29 F.3d 505; 511 (9th Cir. 1994); *In re Herbert*, 806 F.2d 889, 892 (9th Cir. 1986).

We also reject Davis's contention that, in a suit to enforce Oregon's statutory law governing motor fuel franchises, he may recover damages for the emotional pain he suffered from being forced to choose between obeying the court or obeying God. Under Oregon law, damages for emotional or psychic injury are not recoverable in contract. *See, e.g., Hammond v. Central Lane Communications*, 816 P.2d 593, 597 (Or. 1991); *Kelmer v. Washington County*, 800 P.2d 752, 756-58 (Or. 1990). Moreover, absent an affirmative indication that the legislature intended to expand the scope of available remedies, Oregon's courts have refused to hold that a violation of a state statute governing contractual relationships constitutes a tort entitling a plaintiff to recover for emotional distress. *See Farris v. United States Fid. & Guar. Co.*, 587

P.2d 1015, 1018 (Or. 1978) (addressing state statute requiring insurer to make good faith attempt to settle claims promptly and equitably).

Because Davis could not obtain effective relief even if he proved that Texaco violated Oregon law governing motor fuel franchises, his state law counterclaims were properly dismissed as moot.

B

We also agree that the district court properly dismissed Davis's counterclaim under 42 U.S.C. § 1983 for failure to state a claim. To state a claim under section 1983, Davis must show that Texaco acted under color of state law and deprived Davis of a federal right by obtaining from the district court a preliminary injunction requiring him to operate his stations twenty-four hours a day, seven days a week. To be considered "under color of state law," a private actor's conduct must be "fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Even if Texaco could have been considered as acting under color of state law had it employed Oregon's state courts to obtain specific performance, here Texaco used the enforcement mechanisms of a federal district court. Because federal action is not actionable under section 1983, *Wheeldin v. Wheeler*, 373 U.S. 647, 650 n.2 (1963); *Dale-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1987), the district court properly dismissed Davis's section 1983 counterclaim.[4]

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[4] Davis's reliance on *Shelley v. Kraemer*, 334 U.S. 1 (1948), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), and *Cohen*

IV

In addition to his appeal from summary judgment in Texaco's suit for termination, Davis appeals the district court's denial of his request for an order temporarily restraining the termination and the district court's preliminary injunction requiring him to keep his stations open twenty-four hours a day. We dismiss both appeals as moot.

Because we have affirmed the district court's summary judgment in favor of Texaco approving termination of the franchises, reversal or denial of the district court's orders regarding injunctive relief would have no practical effect. *See Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1450 (9th Cir. 1992). Moreover, no "collateral consequences" keep Davis's appeals alive. Davis cannot maintain an action against Texaco for damages because Texaco's termination of its relationship with Davis was lawful under the PMPA. Although Davis maintains that he also has a claim for attorney's fees, see 15 U.S.C. § 2805(d) (attorney's fees to franchisee who prevails in request for TRO), this claim alone cannot revive a moot issue. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990) ("interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim"); *United States v. Ford*, 650 F.2d 1141, 1143 (9th Cir. 1981) ("a claim for attorney's fees does not preserve a case which

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v. Cowles Media Co., 501 U.S. 663 (1991), lacks merit, *Cohen and Shelley* both involved private use of the state courts, and *Edmonson* involved an equal protection claim under the Fifth Amendment where the "state actor" is the federal government.

otherwise has become moot on appeal"), *cert. denied*, 455 U.S. 942 (1982); *cf. Furniture Moving Drivers v. Crowley*, 467 U.S. 526, 535, n.11 (1984) ("*several important collateral matters*, including claims for damages, attorney's fees, and costs" presented a live controversy) (emphasis added).

V

Davis's appeals of the district court's grant of Texaco's motion for a preliminary injunction and of the district court's denial of his motion for an order temporarily restraining Texaco's termination of his franchises are dismissed as moot. We affirm the district court's grant of Texaco's motion for summary judgment on all claims.

AFFIRMED.